M. J. McNally, Inc. *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local Union 210. Case 34–CA–4169

March 20, 1991

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

Upon a charge filed by the Union February 7, 1989, the General Counsel of the National Labor Relations Board issued a complaint March 23, 1989, against M. J. McNally, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Copies of the charge and complaint were properly served on the Respondent. On May 19, 1989, the Respondent filed a one-page letter purporting to be an answer.

On June 8, 1989, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On June 13, 1989, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Union filed a response in support of the motion. The Respondent filed no response.[1] The allegations in the motion are therefore undisputed.

According to the Motion for Summary Judgment, the Acting Regional Director, by letter dated May 9, 1989, notified the Respondent of the requirements of Section 102.20,[2] and advised that unless an answer was received by the close of business on May 22, 1989, a Motion for Summary Judgment would be filed. By a one-page letter dated May 17, 1989, the Respondent's president denied ''the fact in Paragraph 12 [of the complaint]'' that he ''abrogated and refused to abide by the terms of the collective-bargaining agreement,'' and asserted that ''I feel the union did not live up to its agreement by sending me inferior carpenters who were unable to perform the job, and which cost me considerable time and money to correct their mistakes and redo the work.'' The Respondent apparently is not represented by counsel in this proceeding.

The General Counsel, although noting the filing of an ''Answer'' by the Respondent, moves that ''all allegations of the Complaint, which respondent has failed to answer, b[e] deemed to be admitted to be true''; and that the Board issue a Decision and Order finding that the Respondent violated Section 8(a)(1) and (5) of the Act without the taking of evidence in support of the allegations in the complaint.

The Board, having duly considered the matter, finds that summary judgment is not appropriate here. The Respondent's May 17, 1989 letter specifically refers to complaint paragraph 12 when it denies that the Respondent abrogated and refused to abide by the collective-bargaining agreement. The Respondent's letter thus clearly denies the complaint paragraph containing the operative facts of the alleged unfair labor practices, and effectively denies conclusory paragraph 13, which alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5). While the Respondent's additional argument that the Union did not live up to its agreement would not constitute a defense to the allegations in the complaint, this is not relevant to deciding the sufficiency of the answer. The Respondent's letter therefore raises substantial and material issues of fact and law which can best be resolved after a hearing before an administrative law judge.

Although the Board recognizes the importance of strict compliance with procedural rules, including those concerning the manner of filing an answer to a complaint, the Board also is cognizant of the fact that the law favors a determination on the merits. Under the circumstances of this case, the allegations in the complaint shall not be deemed admitted to be true.[3] Accordingly,

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for Region 34 for further appropriate action.

CHAIRMAN STEPHENS, dissenting.

I would grant the General Counsel's Motion for Summary Judgment. The complaint in this proceeding alleges that the Respondent has since October 4, 1988, been bound by the terms of a collective-bargaining agreement whose term expires April 30, 1991. The complaint further alleges that since on or about November 7, 1988, the Respondent has abrogated and refused to abide by the terms of that collective-bargaining agreement in violation of Section 8(a)(5) and (1). The Respondent thereafter filed a letter answer to the complaint denying that it abrogated and refused to abide by the terms of that agreement and asserting, ''I feel that the union did not live up to its agreement by sending me inferior carpenters who were unable to per-

[1] The Notice to Show Cause was served on the Respondent by certified mail at its business address in Danbury, Connecticut, the same address printed on the letterhead of the Respondent's letter to the Acting Regional Director. The Notice to Show Cause was returned unclaimed. The Respondent's refusal or failure to claim certified mail does not serve to defeat the purposes of the Act. *Delta Star Trucking*, 288 NLRB No. 63 fn. 1 (Apr. 22, 1988); *Sheet Metal Workers Local 49 (Driver-Miller Plumbing)*, 124 NLRB 888, 890 (1959).

[2] Sec. 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint.

Sec. 102.20 further states, inter alia, that an answer to a complaint should specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state.

[3] Member Devaney notes that the Respondent's pro se answer denies the gravamen of the complaint.

form the job, and which cost me considerable time and money to correct their mistakes and redo the work.''

Contrary to my colleagues, I do not view this latter sentence as being independent of the Respondent's denial that it abrogated the terms of the bargaining agreement. In context, it is apparent that the Respondent's sole contention is that the Union failed to fulfill its responsibility to refer qualified carpenters, and that this constitutes a defense to any claimed breach on the Respondent's part to fulfill its obligations under the contract. In the absence of any claim by the Respondent, either in its answer or pursuant to a response to the Board's Notice to Show Cause, that the Respondent's denial rests on a ground other than the asserted defense, I find unwarranted the majority's decision to parse the Respondent's answer out of context. I further find that the Respondent's asserted affirmative defense does not justify its abrogation of the contract, and that the Respondent therefore has violated Section 8(a)(5) and (1).